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No. 82-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

The health insurance plan ("Plan") provided for employees by Newport News Shipbuilding and Dry Dock Company ("the Shipyard") historically reimbursed employees for up to $500 of the hospitalization expenses incurred as a result of their own and their spouses' normal childbirths. *See* 37a (App.).[1] In compliance with the Pregnancy Discrimination Act ("PDA"), the Shipyard removed the $500 cap on reimbursable hospitalization expenses resulting from the normal childbirths of its em-

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[1] References herein shall be in accordance with the following convention: to pages in the Appendix to the Petition for a Writ of Certiorari: —— (App.); to pages in the Joint Appendix: J.A. ——; to pages in the Brief on the merits filed by the Shipyard: S. Br. ——; to pages in the Petition for a Writ of Certiorari: Pet. ——; to pages in the Brief on the merits filed by the EEOC: EEOC Br. ——; to pages in the Brief filed by Amicus Curiae American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO"), *et al.*: AFL-CIO Br. ——; and to pages in the Brief filed by Amicus Curiae American Association of University Women ("AAUW"), *et al.*: AAUW Br. ——.

ployees. *Id. See also* Pet. at 8 n.7; 50a-51a (App.).[2] The Shipyard retained the $500 cap with respect to hospitalization expenses resulting from the normal childbirths of employees' spouses.[3]

The EEOC alleges that this Plan, on its face, constitutes intentional discrimination against male employees in violation of § 703(a)(1) because it fails to cover the childbirth-related hospitalization expenses of male employees' spouses to the same extent that it covers the hospitalization expenses of female employees' spouses and, therefore, provides less compensation to the Shipyard's

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[2] The second clause of the PDA requires employers which provide health insurance for their employees to cover the pregnancy-related medical expenses of their female employees to the maximum extent that they cover any other medical risk for employees. *See* Report of the Senate Comm. on Human Resources, S. Rep. No. 331, 95th Cong., 1st Sess. 5 (1977), *as printed in* Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *Legislative History of the Pregnancy Discrimination Act of 1978* [hereinafter, "Leg. Hist."] at 42 ("This bill would . . . require employers who provide medical benefits for their employees' own medical costs to cover the medical and hospital costs of pregnancy . . . of employees on the same terms applicable to other conditions for which employees are covered"); Report of the House Comm. on Education and Labor, H.R. Rep. No. 948, 95th Cong., 2d Sess. 6 (1978), Leg. Hist. at 152 ("There can be no special conditions placed as to the number of days or dollar amount unless that limitation applies to all disabilities covered by the medical benefits plan.").

[3] In this regard, it is noteworthy that women are hospitalized for uncomplicated pregnancies for an average of three days and that the average cost per day for a semi-private room in a hospital located in Virginia as of July 1981 was $120.15. Health Insurance Ass'n of America, *Source Book of Health Insurance Data 1981-82*, 66, 80 (1982). Thus, $500 is ample to cover most hospital stays resulting from normal pregnancies. It is also significant that the Shipyard's Plan covers all prenatal medical expenses for employees' spouses (J.A. 35), as well as 100% of the reasonable and customary charges for delivery and anesthesiologists (37a (App.)), all reasonable and customary pregnacy-related surgical costs, and 80% of the reasonable and customary charges for pregnancy-related medical expenses (Pet. at 7-9).

male employees than it provides to its female employees. *See* J.A. 29-30; EEOC Br. at 9-10.[4] In support of this allegation, the EEOC contends that Title VII prohibits discrimination against males as well as females and that health insurance is a fringe benefit. EEOC Br. at 8-9, 24, 39-40. The Shipyard contests neither of these propositions. Critically, however, the PDA has nothing to do with either of them.

The EEOC's primary argument with respect to the PDA is that its first clause incorporates into Title VII a broad statement of principle indicating that distinctions based on pregnancy, childbirth or related medical conditions are gender-based distinctions and, accordingly, that a health insurance plan which fails to provide reimbursement for the childbirth-related hospitalization expenses of male employees to the same extent that it provides reimbursements for other spousal hospitalization expenses is a *per se* violation of § 703(a)(1). EEOC Br. at 9-10, 12-13, 21 n.19. This analysis is flawed for three reasons. First, the PDA's first clause, as a definition, has no meaning except when read into one of Title VII's substantive provisions. *See* S. Br. at 10-11.[5] Second, when read into § 703(a)(1), which the Shipyard allegedly violated in this case, that clause makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions and privileges of employment because of *such individual's* . . . [pregnancy, childbirth, or related medical conditions]." By its terms, the PDA's first clause therefore has no application to a male employee's claim of "pregnancy"

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[4] Under the EEOC's view of "existing title VII principles," the relevant points of comparison are the levels of benefits provided to male employees' spouses and to female employees' spouses. *See* EEOC Br. at 24 n.22, 38.

[5] The PDA's first clause reads as follows: "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e-(k).

discrimination. *See EEOC v. Lockheed Missiles & Space Co.*, 680 F.2d 1243, 1245 (9th Cir.), *petition for cert. filed*, 51 U.S.L.W. 3485 (Dec. 15, 1982) (No. 82-1006). The third flaw in the EEOC's PDA argument is that the PDA's first clause, even if it could be interpreted so as to apply to a male employee's § 703(a)(1) claim, did not eliminate the EEOC's burden of proving its allegation that the Plan constitutes discrimination "with respect to . . . compensation, terms, conditions, and privileges of employment" before a § 703(a)(1) violation can be found in this case.

ARGUMENT

I. THE SHIPYARD'S PLAN, ON ITS FACE, DOES NOT VIOLATE § 703(a)(1), AS INTERPRETED UNDER "EXISTING TITLE VII PRINCIPLES."

The Shipyard's Plan, on its face, does not discriminate against employees of either sex "with respect to . . . compensation." In terms of financial benefits, the Plan is worth different amounts to each employee. *See* S. Br. at 37-39, 43-47. The amounts actually received by any employee will vary with factors such as health, marital status, number of dependents, and age. *Id.* In no event will that amount depend on an employee's sex. *Id.*[6] Of course, both actual benefits and the contributions which maintain them are "compensation" under Title VII.[7] How-

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[6] As the Court observed in Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 710-11 n.20 (1978), differences in compensation based on a factor other than sex are immune from Title VII sex discrimination challenge because of the Equal Pay Act, 29 U.S.C. § 206(d), and "[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. . . . [T]his Court has never held . . . that discrimination must always be inferred from such consequences."

[7] *See Manhart*, 435 U.S. at 712 n.23. *See also* Hilyer v. Morrison-Knudson Const. Co., 670 F.2d 208, 211, 213 (D.C. Cir. 1981), *cert. granted sub nom.* Morrison-Knudson Const. Co. v. Director, OWCP, 103 S. Ct. 49 (1982) (the "value" to an employee of an insurance policy is the employer's provision of the policy at no

ever, the Shipyard, as a self-insurer, makes no "contributions" to a third party to maintain its Plan and its per capita health insurance costs vary solely with the number and amount of reimbursable claims made. Any difference in its per capita costs, therefore, cannot be attributed to the factor of sex.

As proof that the Shipyard's Plan discriminates against male employees "with respect to . . . compensation" in violation of § 703(a)(1), the EEOC is content to rest on the bald assertion that the Plan "forces a male employee, unlike his female counterpart, to finance himself some of the expenses resulting from his spouse's disabilities." EEOC Br. at 9-10. This is plainly insufficient to establish a violation of § 703(a)(1). It certainly does not show that the Shipyard intended to treat its male employees less favorably than its female employees.[8] Nor does it accurately describe the Shipyard's Plan. Under the Shipyard's Plan, employees of both sexes must finance some of the expenses resulting from their spouses' disabilities. *See* S. Br. at 2-3, 3 n.5, 47. In addition, a male employee with a pregnant spouse may never incur any out-of-pocket costs. *See* S. Br. at 47.[9] The EEOC's theory of "compensation discrimination" would be unpersuasive in this case, moreover, even if it did accurately characterize the Plan. An indistinguishable theory of compensa-

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cost to the employee—this value is appropriately measured by the amount of the employer's contributions); W.W. Cross & Co. v. NLRB, 174 F.2d 875, 878 (1st Cir. 1949).

[8] Because its complaint alleged intentional discrimination, the EEOC had the "ultimate burden of persuading the trier of fact that the . . . [Shipyard] *intentionally* discriminated against [its male employees]." Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 253 (1981) (emphasis added). Proof of discriminatory intent requires proof that the defendant selected a particular course of action "because of" and not merely "in spite of" its adverse effects upon an identifiable group. *See* Personnel Administrator v. Feeney, 442 U.S. 256 (1979). *See also* Pullman-Standard v. Swint, 102 S. Ct. 1781, 1790-91 (1982).

[9] *See also* n.3, *supra*.

tion discrimination was found wanting in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). *See* S. Br. at 37-39, 47-49.

Apparently conceding that no difference in compensation is apparent on the face of the Shipyard's Plan (EEOC Br. at 23 n.21), the EEOC attempts to discount this problem by characterizing it as only an inability to show that the Plan has any discriminatory "effect" (EEOC Br. at 21 n.19). The EEOC thus asks the Court to hold that a compensation program can be found to be a *per se* violation of § 703(a)(1)'s sex discrimination ban even if, on its face, it does not discriminate against employees of either sex "with respect to . . . compensation." Such a conclusion would be contrary to the language of § 703(a)(1) and to all pertinent decisions of this Court.

The holding in *Gilbert* was based only partially on the conclusion that a pregnancy-related distinction is not gender-based. Its more fundamental conclusion was that the challenged compensation program did not, on its face or in fact, discriminate against female employees in violation of § 703(a)(1). 429 U.S. at 138-40. As explained in *Manhart*, the evidence in *Gilbert* showing that female employees received more benefits than men from the disability benefits program "supported the conclusion that . . . plaintiffs failed to establish a *prima facie* case by proving that the plan was discriminatory *on its face*." 435 U.S. at 715-16 (emphasis added). Justice Powell has also observed that "essential equality of *compensation* for comparable work is at the heart of § 703(a)(1)" and that the decision in *Gilbert* was "grounded primarily on the fact that no discrimination in compensation as required by § 703(a)(1) had been shown." *Nashville Gas Co. v. Satty*, 434 U.S. 136, 152-53 n.6 (1977) (Powell, J., concurring) (emphasis in original).[10] Thus, it is mani-

[10] The observations of Justice Powell in *Satty* and of the Court in *Manhart* are reinforced by the views of Justices Stewart and Blackmun. In separate concurrences in *Gilbert*, these Justices

fest that a *per se* violation of § 703(a)(1)'s sex discrimination ban cannot be found absent a finding that the challenged compensation program, on its face, provides unequal compensation for male and female employees. No such finding has been or can be made in this case. *See* S. Br. at 37-39, 42-49.

The AFL-CIO argues that the Shipyard's Plan is unlawful on its face under principles of discrimination established in certain constitutional cases. *See* AFL-CIO Br. at 19-22 (citing *Califano v. Goldfarb*, 430 U.S. 199 (1977), *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), and *Frontiero v. Richardson*, 411 U.S. 677 (1973)).[11] *See also* EEOC Br. at 9 n.5. These cases are distinguishable from the instant case for two reasons. First, the male and female wage earners in each of those cases were similarly situated. Male and female employees are equally capable of having a non-dependent spouse (*Frontiero*), a surviving spouse (*Weinberger*), or a surviving non-dependent spouse (*Califano*). The male and female wage earners in this case, by contrast, are not similarly situated—only a male employee can have a pregnant

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explained that General Electric's plan was not a *per se* violation of § 703(a)(1) and that, in the absence of a *per se* violation, the plaintiffs had the burden of establishing that the plan in fact had discriminatory effects. *See also Satty*, 434 U.S. at 141 ("there was no showing that General Electric's policy . . . favored men over women. No evidence was produced [in *Gilbert*] to suggest that men received more benefits from General Electric's disability insurance fund than did women."); deLaurier v. San Diego Unified School Dist., 588 F.2d 674, 677 (9th Cir. 1978) ("The essential question . . . is not merely whether pregnancy is made a classifying factor, but whether discrimination has occurred").

[11] The AFL-CIO, of course, fails to analyze this case from the perspective of *Geduldig v. Aiello*, 417 U.S. 484 (1974), which is the only directly apposite case in that it deals both with an insurance plan and with the risk of pregnancy. In reaching its conclusion in *Geduldig*, the Court reasoned that the challenged disability program did not classify employees by sex, *id.* at 496-97 n.20, and, in any event, that it did not, on its face, treat female employees any differently than male employees, *id.* at 496-97.

spouse. Discrimination can occur only with respect to similarly situated individuals.[12] Second, the statutes involved in the constitutional cases, like the employment policy involved in *Manhart*, resulted in indisputable sex-based differences in treatment.[13] No such difference in treatment appears in this case.

On its face, the Shipyard's Plan treats all similarly situated employees the same, regardless of their sex: it identically insures male and female employees with respect to all spousal medical expenses which can be incurred by both. The Shipyard's male employees are not deprived of a single spousal benefit which flows to female employees. The Plan, in addition, provides female employees with coverage for the one risk that male employees do not face—it insures them against the risk that they will become pregnant.[14] It also provides male em-

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[12] *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 79 (1981); Ill. Bell Tel. Co. v. FEPC, 81 Ill. 2d 136, 407 N.E.2d 539 (1980) (failure to extend disability coverage to pregnancy does not constitute unlawful sex discrimination since men cannot become pregnant and, therefore, male and female employees are not similarly situated).

[13] The compensation scheme at issue in *Manhart* was a *per se* violation of § 703(a)(1) since, on its face, it resulted in different amounts of take home pay for male and female employees and because that difference was based solely on the factor of sex. *Frontiero* and its progeny are quite similar. In *Frontiero*, for instance, male wage earners with non-dependent spouses were entitled to a fringe benefit—an increased housing allowance, plus health insurance for their spouses—that was denied to female wage earners with non-dependent spouses, even though the male and female employees performed the same work.

[14] Viewed from the perspective of reimbursement for employees' own medical expenses, the Shipyard's Plan can be said to favor female employees in that it covers their pregnancy-related expenses —an additional risk—to the maximum extent that it covers any other medical expense. *But see* S. Br. at 38 n.47. This result, mandated by the PDA's second clause (*see* n.2, *supra*), is not what the EEOC is complaining about. *See* n.4, *supra*. Nor could it complain about this result. The PDA was remedial legislation enacted to benefit the female worker. *See* S. Br. at 10-26. *See also* Brown v.

ployees with coverage for the one *spousal* risk that female employees do not face—it insures them against the risk that their spouses may become pregnant and incur pregnancy-related medical expenses. Female employees are not insured against this spousal risk. Thus, at the spousal level of comparison relied upon by the EEOC, the Plan can be said to favor male employees, not female employees.

II. THE SHIPYARD'S PLAN DOES NOT VIOLATE THE PDA.

In an attempt to support the decision of the court below, the EEOC now argues that "the PDA . . . by its terms, reaches discrimination on the basis of dependent spouses' pregnancies" (EEOC Br. at 17 n.15) and that the PDA itself requires employers to treat the pregnancies of male employees' spouses the same as all other disabilities covered by their health insurance plans (EEOC Br. at 14 & 21 n.19). This is not what the EEOC alleged in its complaint. *See* J.A. 29-30. Moreover, this argument is directly at odds with the position taken by the EEOC in its explanation of Questions and Answers 21 and 22 in the Federal Register. *See* 44 Fed. Reg. 23,804 (1979), *quoted in* S. Br. at 36-37. It also contradicts the position taken by both the EEOC and the Department of Justice during the House hearings on the PDA bill.[15]

Porcher, 502 F.Supp. 946, 956 n.19 (D.S.C. 1980), *aff'd*, 660 F.2d 1001 (4th Cir. 1981), *cert. denied*, 103 S. Ct. 796 (1983). Thus, the Shipyard cannot be faulted for complying with its terms even if that compliance may appear to favor female employees. *See* S. Br. at 30-31 and cases there cited. *See also* Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 469 (1981) (The Court "has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances").

[15] *See Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on*

These inconsistencies are not the only problems plaguing the EEOC's new-found argument and the decision of the court below. The PDA was not meant to cover employees' spouses or in any way to affect an employer's Title VII obligations with respect to its male employees. *See* S. Br. at 13-26.[16] Nothing presented to the Court by the EEOC or its amici shows otherwise.

Education and Labor, 95th Cong., 1st Sess. (1977) [hereinafter, "House Hearings"] at 188 (statement of Issie Jenkins, EEOC Deputy General Counsel) (H.R. 5055 "would only apply to benefits for employees of the employer"); House Hearings at 187-88 (statement of Drew Days, Assistant Attorney General for Civil Rights) ("The bill is to equalize opportunities for employees. I don't understand that you reach dependents and whatever coverage there might be for dependents under plans").

[16] *See also Lockheed*; EEOC v. Joslyn Mfg. & Supply Co., 524 F. Supp. 1141 (N.D. Ill. 1981), *appeal docketed*, No. 82-1634 (7th Cir. April 14, 1982); EEOC v. Emerson Elec. Co., 539 F. Supp. 153 (E.D. Mo.), *appeal docketed*, No. 82-1647 (8th Cir. May 27, 1982).

The AFL-CIO posits that the Shipyard's arguments give different content to Title VII's prohibition on sex discrimination depending on whether male or female employees are injured. AFL-CIO Br. at 2. Similarly, the AAUW claims that under the Shipyard's construction of the PDA no male could ever challenge a pregnancy-based policy even if he were harmed by it and that acceptance of the Shipyard's construction of the PDA would bar every claim by men of sex discrimination based on pregnancy. AAUW Br. at 11-12. Both of these amici misunderstand the Shipyard's position. The Shipyard's argument is that male employees are neither "injured" nor "adversely affected" by a health insurance package which does not cover their spouses' childbirth-related hospitalization expenses to the maximum extent that it covers other spousal hospitalization expenses and that the PDA alters an employer's Title VII obligations in this regard only with respect to its female employees and female applicants for employment. This position does not bar pregnancy-related sex discrimination claims made by men. A refusal to hire men with pregnant spouses, for instance, may constitute a *prima facie* Title VII violation in that it imposes on men an employment-related burden that women need not face—absent proof that the employer's business necessitates such a practice, it may be deemed to deprive male employees of employment opportunities because of their sex (not because of pregnancy) in violation of § 703(a)(2). *Satty*, decided prior to enactment of the PDA,

A. Spouses Cannot Be "Women Affected By Pregnancy."

If spouses may be "women affected by pregnancy" and "other persons," as those phrases are used in the PDA's second clause, the PDA has revolutionized Title VII by proscribing for the first time employer behavior with respect to non-employees and non-applicants.[17] The legislative history of the PDA evidences no such intent.[18] In fact, even Senators Bayh and Cranston, whom the EEOC asserts correctly interpreted the PDA (EEOC Br. at 26-29), never asserted that the PDA itself would require employers to cover spouses' pregnancies. *See* S. Br. at 27-28.

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makes it clear that the PDA was not necessary to make available § 703(a)(2) claims based on pregnancy-related barriers to employment opportunities "because of such individual's . . . sex." *See also* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

[17] The PDA's second clause provides that "women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e-(k). Because of this clause, employers must reimburse female *employees* for pregnancy-related medical expenses to the maximum extent that they reimburse employees for any other medical expenses. *See* n.2, *supra*. This is required regardless of whether or not a failure to do so constitutes a violation of § 703(a)(1).

[18] There can be no doubt that Congress intended the PDA's second clause to impose fringe benefit obligations with respect to female employees alone. When explaining the PDA's fringe benefit obligations, *all* of the congressional committees which reviewed the PDA defined the phrase "other persons" to mean "other employees." S. Rep. No. 331, 95th Cong., 1st Sess. 14, Leg. Hist. at 51; H.R. Rep. No. 948, 95th Cong., 2d Sess. 13, Leg. Hist. at 159; Report of the Comm. of Conference, H.R. Rep. No. 1786, 95th Cong., 2d Sess. 3 (1978), Leg. Hist. at 196. *See also* S. Rep. No. 331, 95th Cong., 1st Sess. 4, Leg. Hist. at 41; H.R. Rep. No. 948, 95th Cong., 2d Sess. 3, Leg. Hist. at 149. Spouses therefore cannot be "other persons." Accordingly, since the Senate Report expressly states that S.995 would not require employers to treat spouses the same as employees (S. Rep. No. 331, 95th Cong., 1st Sess. 5-6, Leg. Hist. at 42-43), spouses simply cannot be "women affected by pregnancy."

In recognition of the fact that the PDA did not impose any requirements with respect to spouses, the Senate Report states that after enactment of the PDA, "the question would remain whether, under Title VII, the affected *employees* were discriminated against on the basis of their sex as regards the extent of coverage for their dependents." S. Rep. No. 331, 95th Cong., 1st Sess. 6, Leg. Hist. at 43 (emphasis added). If Congress had intended the PDA's second clause, or its first clause, for that matter, to mean that employers who provide medical benefits for employees' spouses must cover the pregnancy-related expenses of such spouses, the assertion in the Senate Report that the issue would remain open after enactment of the PDA makes no sense at all.

B. Standing Alone, The PDA's First Clause Has No Meaning.

Apparently recognizing that the court below went too far in concluding that spouses may be "women affected by pregnancy," the EEOC relies primarily on the PDA's first clause.[19] It argues that employers' medical benefits plans must cover spouses' pregnancies to the same extent that they cover other spousal disabilities, not because of the PDA's second clause, but because the PDA's first clause establishes a "broad statement of principle" indicating that "all discrimination among employees resulting from the different treatment of pregnancy-related conditions is sex discrimination prohibited by Title VII." EEOC Br. at 12-13. To support this proposition, the EEOC contends that Congress "amended the general definition section, so that the term 'sex discrimination' in-

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[19] The EEOC virtually concedes that pregnant spouses are not "women affected by pregnancy" within the meaning of the second clause. While noting that the language used in that clause is not determinative (EEOC Br. at 14), the EEOC observes that the legislative history of the PDA "unequivocally state[s] that the . . . [second clause] 'specifically . . . define[s]' what treatment of pregnant *women workers* is mandated by . . . [the PDA]." EEOC Br. at 15 (emphasis added). *See also* AFL-CIO Br. at 14-15; AAUW Br. at 28-29.

cludes discrimination based on pregnancy" (EEOC Br. at 13 n.9). This, of course, is not what Congress did. What Congress did was to add a subsection to Title VII's definition section so that "the terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions." 42 U.S.C. § 2000e-(k). There would be no reason whatsoever to place the terms "because of sex" or "on the basis of sex" in quotation marks unless the definition set forth in the first clause were meant to be read into those parts of Title VII where such terms appear.[20]

The EEOC also argues that the Shipyard's interpretation reduces the PDA's first clause to the status of surplusage since, under the Shipyard's interpretation, the second clause alone is sufficient to protect female employees from pregnancy-based discrimination. EEOC Br. at 15-16. Yet, under the EEOC's interpretation, the

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[20] The phrases "because of . . . sex" or "on the basis of . . . sex" are used in § 703(a)(1), § 703(a)(2), § 703(b), § 703(c)(1), § 703(c)(2), § 703(d), § 703(e), § 703(h), and § 703(j).

The fact that the PDA's first clause, when read into § 717, makes it unlawful for the Federal Government to engage in discrimination "based on . . . pregnancy," rather than "because of . . . such individual's . . . pregnancy" is neither "anomalous" nor "absurd." *See* EEOC Br. at 13 n.9. As the EEOC acknowledges, Congress enacted the PDA in reaction to *Gilbert*, which was a § 703(a)(1) case. Congress was not concerned with the personnel practices of the Federal Government. Indeed, as Justice Brennan observed in his dissent in *Gilbert*, federal employees subject to the jurisdiction of the Civil Service Commission were already eligible for maternity and pregnancy coverage under their sick leave program. 429 U.S. at 158 (Brennan, J., dissenting). In any event, the difference in language between § 703 and § 717 does not mean that "private employers may treat pregnancy in a way which disadvantages male employees, while the federal government may not." EEOC Br. at 13 n.9. By definition, a practice which "disadvantages" *male employees* does so "because of . . . sex" and, thus, may be found to violate § 703, as well as § 717.

PDA's second clause does no more than explain the effect of its first clause. EEOC Br. at 13.[21]

There is no indication that Congress intended the PDA's first clause to make it unlawful for an employer to discriminate against male employees "because of pregnancy." In fact, the Senate Report states that the question presented (where an employer provides medical benefits for employees' spouses) would entail an analysis of "whether, under title VII, the affected [male] employees were discriminated against on the basis of their *sex*," not on the basis of "pregnancy." *See* S. Rep. No. 331, 95th Cong., 1st Sess. 6, Leg. Hist. at 43 (emphasis added). Senators Bayh and Cranston also framed the question presented in a case such as this in terms of "sex discrimination," not "pregnancy discrimination." *See* S. Br. at 27-28. And, of course, the EEOC, in promulgating Questions and Answers 21 and 22, never once even intimated that its answers to those questions were based on the PDA's first clause or on any "broad" concept of "pregnancy discrimination." It claimed, instead, that those answers were based on pre-PDA Title VII principles—*i.e.*, discrimination with respect to compensation because of sex. *See* S. Br. at 36-37.

In any event, as shown above, the result in this case would be no different if the EEOC were correct that the PDA's first clause proscribes discrimination against male employees "because of pregnancy." Whether it alleges discrimination "with respect to . . . compensation" "because of pregnancy" or "because of sex," the EEOC still has yet to show any discrimination "with respect to . . . compensation" in this case.

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[21] Of course, if the PDA's second clause is limited in scope to female employees (*see* n.19, *supra*), the EEOC's contention that it explains the effect of the first clause would mean that the first clause is also limited in scope to female employees. *See* S. Br. at 12-13 and cases there cited.

C. The PDA's Legislative History Does Not Support The EEOC's Position.

The EEOC cites *Brown v. GSA*, 425 U.S. 820 (1976), for the proposition that the Senate, by passing the PDA on the same day, "ratified" the views of Senators Bayh and Cranston on "the effect of the PDA on established Title VII principles." EEOC Br. at 29 n.28.[22] The Court in *Brown*, examining clear and consistent statements in the Senate report, the House report, and in floor remarks addressing the effect of proposed legislation upon the current state of the law, found an "unambiguous congressional perception" which left "little doubt" of the intended scope of that proposed legislation. 425 U.S. at 827-29. Here, even the remarks relied upon do not address the effect of the PDA upon the current state of the law. *See* S. Br. at 26-29. Moreover, the House report does not address the effect of the PDA on employees' spouses and the Senate Report does not support the avowedly personal views of Senators Bayh and Cranston as to the result of applying "existing Title VII principles" in a case such as this. The Senate Report does,

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[22] In this regard, it is significant that it was also on this day that Senator Williams, the principal sponsor of S.995, told Senator Hatch that he was "satisfied that . . . this act only applies to the particular woman who . . . is an employee." 123 Cong. Rec. S15,038-39 (daily ed. Sept. 16, 1977), Leg. Hist. at 80. *See* S. Br. at 25-26. The EEOC's assertion that Senator Williams' comments during this colloquy were limited to the impact of the PDA on income maintenance plans (EEOC Br. at 28 n.27) totally ignores the following portion of the colloquy—the part that satisfied Senator Hatch:

> MR. HATCH: So the Senator is satisfied that, though the committee language I brought up, "woman affected by pregnancy" seems to be ambiguous, what it means is that this act only applies to the particular woman who is actually pregnant, who is an employee and has become pregnant after her employment?
>
> MR. WILLIAMS: Exactly.

123 Cong. Rec. S15,038-39 (daily ed. Sept. 16, 1977), Leg. Hist. at 80. That exchange is not limited to income maintenance plans. *See also Emerson Elec. Co.*, 539 F. Supp. at 157 n.3.

however, confirm the views of both Senators as to the scope of the proposed legislation with respect to the question presented in this case. That question, as acknowledged by Senators Bayh and Cranston, and by the authors of the Senate Report, is to be resolved in accordance with Title VII principles other than the PDA.

The EEOC's letters to Senator Javits also acknowledge this. The first letter begins with the premise that S.995 would require coverage only of employees' pregnancies. J.A. 45. It thereafter states that "general Title VII and Equal Pay Act principles would require coverage of similar costs imposed on male employees by virtue of the pregnancy of their wives. . . . On the other hand, the basic principles of Title VII would also be satisfied if medical insurance programs treated female employees and the wives of male employees equally with respect to pregnancy benefits." J.A. 46.[23] This position, which is not the position the EEOC takes today,[24] was soundly rejected by the authors of the Senate Report—"this bill would not mandate that women dependents be compared with women employees" (S. Rep. No. 331, 95th Cong., 1st Sess. 5-6, Leg. Hist. at 42-43)—and in the EEOC's Question and Answer 22—an employer need not "provide the same level of health insurance coverage for the pregnancy-related medical conditions of spouses of male employees as it provides for its female employees." 29 C.F.R. Part 1604 (App.) (Question and Answer 22).[25]

The second letter represents a retreat from the position taken in the first letter. It states that, "our view that the additional medical insurance required by the bill

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[23] There is no apparent difference between these purportedly alternative positions.

[24] *See* n.4, *supra*.

[25] *See also* 44 Fed. Reg. 23,805 (1979) ("Title VII does not require employers to provide the same coverage for the pregnancy-related medical conditions of spouses of male employees as it provides for the pregnancy-related costs of its female employees").

for female employees would be required for the wives of male employees . . . would not apply where the employer offers health insurance to employees only." J.A. 48. There is no evidence that this view was communicated to any member of Congress other than Senator Javits. And, if it was communicated by Senator Javits to the Senate Committee, it was rejected. The Senate Report states in no uncertain terms that the question of dependents' pregnancy benefits remains an open one where employers' medical benefits plans cover dependents.

The cost estimates relied upon by the EEOC are similarly unhelpful to its argument. The EEOC observes that the Department of Labor ("DOL") submitted a report which stated that precise data on costs could not be estimated because, "[p]ublished data . . . with information on dependents' health care coverage are only available through 1970. Thus, this coverage would have to be extrapolated to 1976 with . . . significant further adjustments to assess costs for dependents."[26] This statement indicates that DOL believed that dependents' health care costs would have to be deleted when the extrapolation was completed, not, as the EEOC apparently believes (EEOC Br. at 30-31, 34), that they would have to be included. If DOL believed that dependents' health care costs were to be included, simple extrapolation of the 1970 figures, which included dependents' costs, would have been enough.

The EEOC also relies on cost estimates prepared by the American Council of Life Insurance ("ACLI"). The ACLI used the number of women in the childbearing population, rather than the number of female workers, in preparing its estimates of the PDA's medical benefits

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[26] EEOC Br. at 31 (quoting *Discrimination on the Basis of Pregnancy, 1977: Hearings on S.995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. (1977) [hereinafter, "Senate Hearings"] at 563-64; House Hearings at 182).

costs because it thought that the PDA, like New York's insurance law, would require employers which provide health insurance for their employees to treat alike the pregnancies of all women covered by that insurance. Senate Hearings at 425-26; House Hearings at 96-98.[27] ACLI Vice President Richard Minck made a statement to this effect in his testimony. *See* House Hearings at 120-21. The EEOC's assertion that Mr. Minck's view is an "uncontradicted interpretation of the bill's scope" (EEOC Br. at 30) is belied by its own view of the PDA —the EEOC's argument is that the PDA requires all spouses to be treated alike, not that the PDA requires employers to treat alike the pregnancies of all women covered by their insurance plans.[28]

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[27] New York's insurance law requires all health insurance policies issued for delivery or delivered in the state to cover costs of normal pregnancies (for the insured and all dependents) to the same extent that they cover costs for any illness or disease. *See* S. 10536, Chap. 843, laws of 1976, as codified at N.Y. Ins. Code §§ 162-a, 164-a (McKinney Supp. 1982). It also provides that coverage for normal pregnancies "may be limited to reimbursement of covered expenses . . . for a period of four days of hospital confinement." *Id. Cf.* n.2, *supra*. The Senate Report faulted the ACLI's cost estimates, which were based on experience under New York's insurance law, as "demonstrably too high" because the PDA would not "require . . . insurance coverage for maternity under all plans administered by insurance companies." S. Rep. No. 331, 95th Cong., 1st Sess. 9, Leg. Hist. at 46. At the same time, it cited Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board, 41 N.Y.2d 84, 359 N.E.2d 393 (1976), for the proposition that some states had already "refused to adopt the approach taken . . . in . . . *Gilbert*." S. Rep. No. 331, 95th Cong., 1st Sess. 10, Leg. Hist. at 47. *See also* S. Br. at 22; H.R. Rep. No. 948, 95th Cong., 2d Sess. 11, Leg. Hist. at 157 (PDA would have "little or no economic impact" in states where the state FEP law, and/or the state disability law, already require coverage for "pregnant disabled workers").

[28] *See* n.4, *supra*. *See also* n.15, *supra*; 29 C.F.R. Part 1604 (App.) (Questions and Answers 21 and 22).

III. QUESTIONS AND ANSWERS 21 AND 22 ARE ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW.

The EEOC hopes to convince the Court that Questions and Answers 21 and 22 constitute its "contemporaneous" interpretation of the PDA. EEOC Br. at 37. In an attempt to explain why it advised the public in 1979 that Questions and Answers 21 and 22 were *not* an interpretation of the PDA (*see* S. Br. at 35-37), the EEOC now asserts that they are based on "substantive Title VII precepts operating in conjunction with our interpretation of the PDA." EEOC Br. at 39-40 n.35.

These regulations are invalid regardless of what they purport to interpret. If based on existing Title VII principles, they are invalid because those principles do not support them. *See* pp. 4-7, *supra*; S. Br. at 36-39, 41-49. *See also Lockheed*, 680 F.2d at 1246 n.3. If based on the PDA, they are contrary to the intent of Congress. *See* pp. 9-14, *supra*; S. Br. at 9-31. *See also Emerson Electric Co.*, 539 F. Supp. at 156. In enacting the PDA, Congress, like Justice Brennan in his dissent in *Gilbert*, was concerned with the impact of certain employers' pregnancy policies on women's careers. *See Gilbert*, 429 U.S. at 158-60 (Brennan, J., dissenting). *See also* S. Br. at 14-19. It was not concerned with male employees or their dependent spouses.

CONCLUSION

The Shipyard submits that the foregoing points and authorities, together with those set forth in the Brief for Petitioner, mandate reversal of the decision of the court below.

Respectfully submitted,

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